Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

WM. H. MULLER & CO., INC.,
Petitioner-Appellant Below,

versus

SWEDISH AMERICAN LINE LTD. and TRANSATLANTIC STEAMSHIP COMPANY, LTD.,
Respondent-Appellee Below.

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

Statement.

After the petition herein was filed the decision of the Court of Appeals was officially reported at 224 Fed. 2d 806.

This brief will serve to reply to matters asserted in respondent's brief and further to call to the attention of this Court a decision in point which has been decided since the filing of the petition herein.

POINT I.

The District Court did not hold that the libel should be dismissed on the ground of *forum non conveniens* nor did our appeal before the Court of Appeals or the petition for a writ of certiorari accuse the District Court of an abuse of discretion.

Respondent argues that the petition for a writ presents two questions of which the second is (p. 1):

> "(2) Whether the District Court abused its discretion in holding that there should be dismissed on the ground of *forum non conveniens* an action for loss of cargo * * *."

Again at page 3 it is asserted that "the District Court below found * * * that the libel should be dismissed on ground of *forum non conveniens.*"

Accordingly respondent argues that the determination of fact and exercise of discretion on the part of the District Court is not an appropriate question for review by this Court on writ of certiorari (p. 3).

We submit no such issue was raised by the petitioner. The District Court did not exercise its discretion in declining jurisdiction on the ground of *forum non conveniens.* In fact, such court never reached that question but rested its decision on the point that the bill of lading provision was binding as a contractual obligation and therefore enforceable. It touched upon the question *forum non conveniens* only in the following language:

> "Were I to reach the question of forum non conveniens, I would hold to the same conclusion in view of the agreement plus the facts that the *Oklahoma* is Swedish owned, was built in Sweden and all the crew members reside there."

This we submit, is a far cry from holding that dismissal of the libel by the District Court was on the basis of an exercise of discretion in applying the doctrine of *forum non conveniens.*

POINT II.

By applying the test of reasonableness to the validity of a jurisdictional clause, the court below has confused the rights of American citizens dealing in international commerce.

The court below considered that it was reasonable to enforce a unilateral clause because the *Oklahoma* was Swedish owned, etc.

In the recent case of *S. S. Punta Del Este,* as yet unreported, which was decided by FORMAN, C. J. in the Federal

Court for the District of New Jersey* a similar clause requiring suit in Uruguay was presented in an action between foreign nationals both alien to the United States. Judge FORMAN commented:

> "Although such contracts cannot bind a court, a recent decision in the United States Court of Appeals for the Second Circuit has held that they may be enforced, where it is reasonable to do so."

citing the instant case. Nevertheless Judge FORMAN refused to decline jurisdiction and send the parties to Uruguay even though neither was a citizen of the United States of America. His consideration of the case was based upon the reluctance of our courts to send litigants to a non-neutral forum for the settlement of their disputes. He said:

> "No case has been cited in which discretion has been exercised to send the parties to a non-neutral forum unless there was found an express agreement to submit to the laws of a particular country and to litigate only in its courts."

Thereupon he found that since it would serve no greater inconvenience to bring the ship's witnesses to New Jersey than to send libelant's clerks to Montevideo, there is no "balance strongly in favor of defendant which would move the court to exercise discretion in defendant's behalf."

Where then are cargo libelants left by these conflicting decisions? The Second Circuit chose to separate a clause of the contract requiring suit in Sweden with Swedish law to govern and enforce only the forepart of the clause, i.e., suit in Sweden. It declined to enforce the applicability of Swedish law in part because the Carriage of Goods by Sea Act provides that only the United States of America law shall be applicable when the goods move to or from United States ports in foreign commerce and in part because respondent, realizing our courts would not enforce Swedish

* Decision in full reported as Appendix.

law, included within the four corners of the bill of lading a modifying clause permitting the Swedish courts to apply United States of America law.

Must a cargo owner in each case first determine whether the foreign court will apply our laws? What would be the outcome if the foreign court chose to refuse to apply the Carriage of Goods by Sea Act in preference to its own laws? These imponderables will be presented in every case unless this Court acts definitively to uphold the retention of jurisdiction when sought by a United States citizen suing in his own right.

The respondent's suggestion that the decision herein is applicable to the facts in this case *only* and thus is not reviewable by this Court is contradicted by the admission that the right of an American citizen to maintain jurisdiction in United States courts has never before been passed upon by this court. If this writ of certiorari be denied the result will be to leave this question in its present confused and vague state and to subject the lower courts and litigants to an interminable number of interlocutory proceedings to determine reasonableness.

POINT III.

The lower court should have held the clause invalid, per se, as contrary to the public policy of the United States.

It is the public policy of the United States, as established in *Insurance Company* v. *Morse* and many other cases* that jurisdictional clauses are null and void, *per se,* without regard to the circumstances of the case. This policy is clearly defined in the case where a United States citizen is faced with such a clause by the indisputable fact that a citizen, suing in his own right, has never before been relegated to a foreign forum for redress (except seamen covered by a treaty).

* Cited by petitioner at page 10 of the petition.

The policy is in no sense fanciful or doubtful, but rests upon a sound realization of the fact that a United States citizen supports the federal courts and is entitled to maintain his action in those courts. This was recognized by Mr. Justice HOLMES in *Douglas* v. *New Haven R. Co.*, 179 U. S. 377, 387:

> "There are manifest reasons for preferring residents in access to often overcrowded courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the courts concerned."

It has always been understood by the courts that clauses which *tend* to wholly oust a proper court of jurisdiction also tend to increase or diminish the statutory judicial power and impede the regular administration of justice, all in violation of public policy. *Insurance Company* v. *Morse*, 87 U. S. 445, 453; *U. S. Asphalt Refining Co.* v. *Trinidad Petroleum Co.*, 222 Fed. 1006.

The petitioner strongly urges, as it did in the courts below, that the requirement of bringing its suit in a foreign country is a diminution of the rights flowing to cargo owners under the Carriage of Goods by Sea Act. The cost to which a damaged cargo owner is to be put in litigating his claim abroad is an unwarranted restriction of his rights and furthermore is against our public policy. The analysis of this argument was strongly noted in the case of *United States* v. *Farr Sugar Corp., et al.*,* affirmed

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*191 Fed. 2d 370, 374:

"* * * The shipowners stress the consensual nature of the clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all of its twenty-eight lengthy paragraphs, of which this clause is No. 9. This lack of equality of bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand. Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 441, 9 S. Ct. 469, 32 L. Ed. 788; Inman v. South Carolina R. Co., 129 U. S. 128, 139, 9 S. Ct. 249, 32 L. Ed. 612; Sante Fe, P. & P. R. Co. v. Grant Bros. Const. Co., 228 U. S. 177, 184, 185; 33 S. Ct. 474, 57 L. Ed. 787. Hence so definite a relinquishment of what the law gives the cargo as is found here can hardly be found reasonable without direct authorization of law. * * *"

by this Court, 343 U. S. 236, wherein CLARK, C. J., speaking for the Court of Appeals, Second Circuit, refused to uphold the so called "Both-to-Blame" collision clause.

POINT IV.

Respondents do not dispute facts which compel this court to review the decision below.

Nowhere in the reply brief does the respondent dispute petitioner's contention that the main reliance of the Court of Appeals upon *Krenger* v. *Pennsylvania Railroad Co.* is indefensible. The court below in attempting to justify its refusal to follow the *Morse* case quoted from dictum of L. HAND, Ch. J. in a case which related merely to an agreement to sue only in one of two federal districts in the United States. No regard was given to the vast difference between those facts and sending a United States citizen to Sweden for justice.

Respondent agrees that the question before the Court is whether an American citizen is bound by the jurisdictional clause found in a foreign bill of lading. It does not dispute the fact that this is the first decision ever to hold that an American citizen, suing in his own right, is so bound and thus obligated to sue in a foreign, non neutral forum (with exception of a seaman covered by a treaty). Respondent's contention, therefore, that this is not a question important to the general public would seem to be foreclosed from its own brief. Such a radical departure from public policy as represented by judicial precedents is most important to the entire maritime industry, including businesses engaged in or affected by international commerce.

Respondent's contention that the *Morse* case is not controlling nor applicable is in conflict with the lower court's own language. Judge HINCKS, referring to juris-

dictional clauses, observed that "The law has long viewed such agreements askance" and referred to the *Morse* case among other authorities.

This is not an action where the petitioner has become subrogated to or is the assignee of an alien, which are the facts of the cases relied upon by respondent. On the contrary, the petitioner was the actual owner of the cargo at the time of the loss.

CONCLUSION.

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

GEORGE B. WARBURTON,
Proctor for Petitioner.

HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON,
DAVID L. MALOOF,
JOSEPH T. MCGOWAN,
of Counsel.

November, 1955.

APPENDIX.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

SOCIEDADE BRASILEIRA DE INTERCAMBIO COMERCIAL E INDUSTRIAL, LTDA., *Libelant,* vs. S. S. PUNTA DEL ESTE, her engines, boilers, etc., and ADMINISTRACION NACIONAL DE PUERTOS, *Respondents.*	Civil Action 239–55 in Admiralty On Motion to Decline Jurisdiction OPINION

APPEARANCES:

SMITH, STRATTON & WISE, by Hugh D. Wise, Jr., Proctors of Respondents, Gordon W. Paulson, of Counsel.

RICHMAN & BERRY, Proctors for Libelant, HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON, by J. Edwin Carey, of Counsel.

FORMAN, C. J.:

On August 10, 1953 the S. S. Punta Del Este left New Orleans carrying 80,000 bags of wheat flour shipped under bills of lading issued by Leo Zeitlin & Co., Inc. of New York and which were consigned to the libelant, a corporation of Brazil. It is alleged that the flour arrived at its destination, Santos, Brazil, in damaged condition. Libelant attached the Punta Del Este while she was at dock within this jurisdiction and later consented to her release after filing of security by respondents.

The Punta Del Este is owned by the Administracion Nacional De Puertos, an agency of the Uruguayan govern-

ment. The Administracion chartered the Punta Del Este to Montemar, S.A., a Uruguayan corporation, which, in turn, chartered her to Leo Zeitlin & Co. of New York.

The respondents have now moved this court to decline to exercise the jurisdiction it concededly has over this cause on the ground that the suit is one between aliens and can be more conveniently tried elsewhere. The parties agree that the issue is solely one for this court's discretion. See 1 Benedict on Admiralty § 84.

Respondents attempt to show that libelant has bound itself by contract to litigate its claim only in Uruguay and under the law of that country. Although such contracts cannot bind a court, a recent decision of the United States Court of Appeals for the Second Circuit has held that they may be enforced, where it is reasonable to do so. Wm. H. Muller & Co. v. Swedish American Line, 224 F. 2d 806 (2nd Cir. 1955).

The affidavit submitted by respondents' counsel states that in their charter agreement the Administracion and Montemar, S.A. agreed to submit their disputes to the laws and courts of Uruguay. It has not been demonstrated that this charter agreement between the Administracion and Montemar, S.A. has been made applicable to the libelant.

The bill of lading of Leo Zeitlin & Co. provides: "all terms, conditions and exceptions as of charter party dated July 17, 1953 to be considered as fully incorporated". This has reference to the charter party between Montemar, S.A. and Zeitlin, which has not been placed before this court. But, assuming that it has a provision whereby Zeitlin and Montemar, S.A. agreed that Uruguayan law was to apply, that provision could not be imposed upon the libelant for the bill of lading issued by Zeitlin to libelant further provides:

> "This shipment shall have effect subject to the provisions of the Carriage of Goods by Sea Act of

> the United States (46 U. S. C. § 1300, et seq.), approved April 16, 1936, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act."

Thus, any condition in the Zeitlin-Montemar charter party that the parties to whom it applies are to litigate only under Uruguayan law would be modified by this express imposition of the Carriage of Goods by Sea Act contained in the Zeitlin bill of lading.

The Zeitlin bill of lading also contains a clause that

> ". . . the rights and obligations . . . of each and every person . . . in respect of the receipt, care, custody, carriage, delivery or transshipment of the goods . . . shall be subject to and governed by the terms of the carrier's regular bill of lading, which shall be deemed to be incorporated herein. . . ."

A copy of the regular bill of lading of the Administracion does carry a provision that all claims "if made judicially . . . must be heard before the competent Court in the City of Montevideo." This is by no means inconsistent with the provision that American law is to apply, and is an agreement that certainly is not binding on the court, and even under the decisions cited by respondents is not to be enforced where that would be an "unreasonable" course. Wm. H. Muller & Co. v. Swedish American Line, supra.

The respondents rely on the following cases: Wm. H. Muller & Co. v. Swedish American Line, supra; Cerro de Pasco Copper Corp. v. Knut Knutsen, 187 F. 2d 990 (2nd Cir. 1951); United States M. & S. Ins. Co. v. A/S Den Norske A. Og. A. Line, 65 F. 2d 392 (2nd Cir. 1933) and The Iquitos, 286 F. 383 (W. D. Wash. 1921). In each there were specific provisions requiring the parties to litigate in and under the law of a particular forum. They are

distinguishable because here the agreements impose no such identity of both governing law and situs of litigation which can be said to bind the libelant.

Some features of the case of Galban Lobo Trading Co. S/A v. The Diponegoro, 108 F. Supp. 741 (S. D. N. Y. 1952), relied on by the respondents, are similar to this one. That was a suit by a Cuban corporation against an Indonesian corporation for damage to a cargo of sugar. The cargo was shipped from Havana and only part was delivered to its destination in Israel. The remainder, for some unexplained reason, had been discharged in Marseille. Despite the fact that the contract of carriage had been executed in New York and incorporated the provisions of the Carriage of Goods by Sea Act, the court declined jurisdiction, leaving the parties to the French courts. It was found that a court in Marseille would be a more convenient forum because of the easier availability there of sources of proof. But, it is to be noted that in the Galban Lobo case the parties were remitted from one neutral forum to another. In this case the effect of declining jurisdiction would be to force libelant to sue in respondents' home forum. In The Harfry, 39 F. Supp. 893 (D. N. J. 1941), the lack of another available neutral forum was held to have significant weight in a decision to retain jurisdiction over an admiralty action between aliens. No case has been cited in which discretion has been exercised to send the parties to a non-neutral forum unless there was found an express agreement to submit to the laws of a particular country and to litigate only in its courts. See also Bernhard v. Greene, Fed. Case No. 1,349 (D. Ore. 1874); The Belgenland, 114 U. S. 355, 368-369 (1885).

As to the availability of proof, respondents urge as a reason for granting the motion to decline jurisdiction that the testimony of tally clerks at Santos, as well as that of the crew of the Punta Del Este, will be needed. Respondents also point out that the ship's officer who was in charge

of unloading the cargo is no longer on board the Punta Del Este and that his testimony, too, will have to be brought here from Santos, since he is presently engaged in shore duty there. However, libelant has asserted without contradiction that the Punta Del Este has been in North American waters for the past several months and therefore the testimony of her crew has been readily available.

Respondents also support their argument by agreeing to transfer the security they have deposited in this court to Uruguay and to waive any defense they may have under a statute of limitations. Thus, they assert, libelant will not suffer "hardship" by a dismissal of the libel. That is not the point. What are to be applied in this case are the criteria included in the doctrine of forum non conveniens (as distinguished from those applied under the transfer provisions of 28 U. S. C. § 1404(a); see Norwood v. Kirkpatrick, 349 U. S. 29 (155)). Under that doctrine the important right of the plaintiff or libelant to choose as he pleases from among the possible sites of litigation is respected unless the defendant or respondent can show that he will be "unfairly prejudiced", Kloeckner Reederei und Kohlenhandel v. A/S Hakedal, 210 F. 2d 754, 756 (2nd Cir. 1954), or it is found that "the balance is strongly in favor of the defendant", Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508 (1947). And since it will be no greater inconvenience for the respondents to bring to this court testimony of persons in Santos than it would be for libelant to take that of clerks in New Orleans to Montevideo, there is no "balance strongly in favor of the defendant" which would move the court to exercise its discretion in respondents' behalf.

Therefore, the motion to decline jurisdiction will be denied and an order should be settled accordingly.